

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

PATRICIA A. THIEKEN,  
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,  
Agency.

(CSA 3 333 180)

DOCKET NUMBER  
CH-831E-92-0447-I-1

DATE: JAN 04 1993

Mary L. Homan, Huber Heights, Ohio, for the appellant.

Carol Pelosi, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Antonio C. Amador, Vice Chairman  
Jessica L. Parks, Member

OPINION AND ORDER

The Office of Personnel Management (OPM) petitions for review of the initial decision, issued August 28, 1992, that reversed its reconsideration determination that the appellant's application for disability retirement was untimely filed. For the reasons set forth below, the Board GRANTS the agency's petition for review, REVERSES the initial decision, and SUSTAINS OPM's reconsideration decision.

BACKGROUND

The \* appellant resigned from her position with the Department of the Army on May 3, 1985, after completing 27 years of Federal service. On January 21, 1992, the appellant filed an application for disability retirement.

OPM dismissed the application as untimely filed, informing the appellant that the applicable statutory provision, 5 U.S.C. § 8337(b), requires that disability retirement applications be filed either prior to separation from service or within one year thereafter. OPM also informed the appellant that this requirement could only be waived if a former employee was mentally incompetent at the time of separation, or became incompetent within one year thereafter, and if the former employee filed the application within one year from the date he or she is restored to competence or a guardian is appointed. OPM further informed the appellant of what it considered to be the meaning of mental incompetence and the documentation, including medical evidence, it deemed necessary to prove it. Finally, OPM told the appellant that she could request reconsideration of its determination. Following the appellant's request for reconsideration, accompanied by additional documentary evidence, OPM issued a reconsideration decision affirming its prior determination that the application was untimely filed and that the submitted information did not establish that the appellant was incompetent.

The appellant filed an appeal of this determination with the Board's Chicago Regional Office. Following a hearing, the administrative judge reversed OPM's determination, finding that the testimonies and documentary statements of the appellant, her family, friends, and former co-workers, established that the appellant had a minimal capacity to manage her affairs and that she did not have sufficient control of her mental faculties to pursue an application for disability retirement or to provide oral direction to someone else who could have filed an application on her behalf. The administrative judge further found that, because the appellant filed her disability retirement application within one year after regaining her mental competence, it was timely filed. The administrative judge, therefore, ordered OPM to accept the appellant's application as timely filed.

In its petition for review, the agency argues, *inter alia*, that the subjective evaluations of the appellant's condition by the appellant and her supporters are not sufficient to establish mental incompetence in the absence of supporting medical documentation. We agree.

#### ANALYSIS

As mentioned above, the statutory deadline for filing a disability retirement application may only be waived where an applicant establishes that he or she was mentally incompetent at the date of separation from service, or within one year thereafter, and the application is ultimately filed within one year from the date of the applicant's restoration to

competence, or the appointment of a fiduciary, whichever is later. See 5 U.S.C. § 8337(b).

In determining whether a disability retirement filing deadline could be waived because the applicant was mentally incompetent, the Board has consistently required medical evidence supporting subjective opinions of incompetence. See e.g., *Bridges v. Office of Personnel Management*, 37 M.S.P.R. 290, 292-93 (1988) (appellant's psychiatrist's testimony, with testimony of brother and other documentary evidence established that filing deadline should be waived due to appellant's mental incompetence). Indeed, we recently held that it is error for an administrative judge to rely upon the testimonies of the appellant and her husband to find mental incapacity, absent a medical report supporting the testimony. See *Crane v. Office of Personnel Management*, MSPB Docket No. BN831E9110059, slip op. at 5 (Aug. 5, 1992). We also note that the medical evidence requirement for substantiating subjective testimonies of incapacity in cases involving waiver of the filing time limit is consistent with the evidentiary requirements in cases involving disability retirement entitlement. See e.g., *Easterwood v. Office of Personnel Management*, 48 M.S.P.R. 125, 129 (1991) (subjective evidence, supported by competent medical evidence, cannot be dismissed as self serving), *dismissed*, 950 F.2d 731 (Fed. Cir. 1991) (Table).

In the present case, OPM informed the appellant of the requirement that she submit medical evidence substantiating

her claim of mental incompetence. Agency File, Tab C. None of the evidence she submitted to either OPM or the Board, however, substantiates a mental problem. Instead, the medical evidence chronicles her pulmonary disease, weight, and problems with nausea, acidity, bladder control, muscle control, knee injury, and fatigue.\* Agency File, Tabs B, D; Appeal File, Tab 1. We, therefore, conclude that the appellant has failed to meet her burden of proving that the filing deadline should be waived because she was incompetent. See *Crane*, slip op. at 4.

#### ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

#### NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

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\* We also note that the appellant has submitted "new evidence" with her response to the agency's petition for review in the form of various medical reports from March 25, 1991, through September 30, 1992. These reports, however, do not substantiate the appellant's claim of mental incompetence. Instead, they also pertain to some of the medical problems mentioned above. Thus, the "new evidence" is not material. See *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980).

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.